No. 2493

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHARLIE LOUIE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Plaintiff in Error

VANDERVEER & CUMMINGS,
Attorneys for Plaintiff in Error.

Seattle, Washington.

Press of Pliny L. Miller, Seattle, Washington

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STATEMENT OF THE CASE

Insofar as it is material to the assignments of error which will be considered in the following pages, the history of the present case is as follows:

On April 2nd, 1913, an indictment was filed in the United States District Court for the Western

District of Washington, Northern Division, charging James A. Ralston and Charlie Louie with the offense of conspiring to import, conceal, transport and facilitate the concealment and transportation of certain opium. On the 15th of May, 1913, both were acquitted of this charge.

On the 12th of September, 1913, another indictment was returned into the same court charging Ralston as a principal and Louie as an accessory with a violation of the Act of February 6, 1909, commonly known as the offense of smuggling opium.

To the second, fourth, sixth and eighth counts of this indictment the defendant Louie pleaded the former acquittal. A demurrer to this plea was sustained. This ruling and the court's instructions to the jury upon the effect of the former acquittal, present the most serious errors in the record.

Upon the trial of this indictment the defendant Louie was found guilty upon the second count, and not guilty upon all the other counts. Thereafter he was sentenced upon said verdict to imprisonment for sixty days in the county jail and to pay a fine of five hundred dollars. This is the judgment now under review.

The other assignments of error have to do with the admission of certain evidence which will be referred to in the argument.

ARGUMENT

POINT I

THE COURT ERRED IN SUSTAINING THE DEMURRER TO THE PLEA OF FORMER ACQUITTAL.

The plea, which is set out at length on pages 10 to 17, inclusive, of the transcript, recites the returning of the former indictment, the joinder of issue and trial, and the verdict of not guilty. It also alleges that the persons are identical, the offenses identical, and that the judgment pronounced upon said verdict still stands unreversed. It would seem that a demurrer admitting these facts must necessarily be bad. The plea, however, sets forth the former indictment at length, and upon the assumption that the court may go behind the legal conclusions of the pleader in determining the identity of the offenses, we desire to consider the plea

on its merits in order that the court may arrive at a conclusion which will dispose of the matter finally.

For convenience we have paraphrased the material portions of the two indictments and arranged them in the form of a deadly parallel:

The material portions of the first indictment are as follows: "James A. Ralston and Charlie Louie did —conspire, confederate and agree —to receive, conceal, buy, sell and facilitate the transportation, concealment and sale—of—opium."

The plan of the conspiracy is then described about as follows: The defendant Ralston was to go to British Columbia and other places and import and deliver opium to the defendant Louie who was to pay for the opium and the cost of importing the same, pay Ralston certain compensation and retain the balance of the proceeds.

The last overt act is described as follows: "And during the continuance thereof, to effect the object thereof—James A. Ralston did on the 5th day of March, 1913, have in his possession and conceal —transport and facilitate in transporting and aid and assist in transporting 64 five-tael tins of opium."

The material portions of the second count of the second indictment upon which the defendant Louie was convicted, are as follows:

On the fifth day of March, 1913, James A. Ralston did receive, conceal, buy, sell and facilitate the transportation, concealment and sale of — sixty-four five tael tins of opium — and — Charlie Louie did on said fifth day of March, 1913, wilfully, knowingly—aid, abet, counsel, command, induce and procure said James A. Ralston to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of said opium.

Before undertaking a further analysis of these indictments, we would call the court's attention to certain points of identity. In his seventh instruction, top of page 37 of the transcript, the court takes judicial notice that the opium involved in each case was the same. The overt act set out in our paraphrase of the conspiracy indictment, which is charged in almost the identical language of the second indictment, shows that the completed offense involved in the second indictment was committed during the conspiracy charged in the first.

The Federal statute under which the first indictment was returned, employs the word "conspire". Conspiracy is defined as a confederation or combination to effect certain purposes. These words impart the idea of cooperation, association or union, which is the very essence of the offense of conspiracy. It does not matter how informally it may be accomplished or expressed, any association or union of two or more persons for the purpose of committing an offense against the United States, is a criminal conspiracy under the Federal statute. Interpreting the first indictment in the light of this principle, it charges that the defendants Ralston

and Louie cooperated, associated and united themselves to receive, conceal, buy, sell and facilitate the transportation, etc. of opium, and pursuant thereto, on the 5th of March, 1913, Ralston had in his possession and concealed, etc. sixty-four five-tael tins of opium. The portions of the first indictment in which is outlined the plan of the conspiracy are merely descriptive, and although this descriptive matter may be essential to a good pleading, it is clear that without it sufficient facts are charged to constitute the offense of conspiracy. No variance in pleading descriptive matter can effect the question of jeopardy and for all present purposes it may be disregarded. See *Ball v. U. S.* 163 U. S. 662.

We would suggest that at this point the court compare our paraphrase of the second indictment with our analysis of the first indictment. If the offenses charged in these two indictments are not the same in everything but form, we submit the English language has become an instrument for concealing rather than expressing ideas. In the first case, the defendant was acquitted of the charge of cooperating, associating and uniting with Ral-

ston for the purpose of receiving, concealing, facilitating the transportation, etc. of opium. In the second case he was convicted of the charge of wilfully and knowingly aiding, abetting, counselling, commanding and procuring Ralston to do the same thing at the same time and in the same place. How could Louie be innocent of *any* association with Ralston and yet be guilty of *the particular* association charged in the second indictment ?

The authorities say that a plea of former acquittal is well taken when the evidence necessary to sustain the second charge would have sustained the first charge.

1 Wharton's Criminal Law, 11th Ed. Sec. 393.
Ex Parte Nielson, 131 U. S. 176.
Ball v. United States, 163 U. S. 662.

Just so surely as the general includes the specific, would the evidence that Charlie Louie wilfully and knowingly aided, abetted, counselled, commanded, induced and procured Ralston, have sustained the charge that he confederated, combined, associated or united with him.

The constitutional guaranty against double jeopardy is not a mere form to be evaded by sub-

terfuge or artful counsel, but is a substantial guaranty against unlimited prosecution, without which no man's liberty is safe. The two Supreme Court decisions already referred to, and the case of *People v. Stephens,* 21 Pac. Rep. 856, are fine examples, we believe, of the principles involved and of the spirit in which they should be applied.

Counsel will doubtless refer to cases in which it has been held that a prosecution for conspiracy does not bar a second prosecution for the completed offense. With all due respect to these authorities, many of which we believe are rather refined in their reasoning, we submit that they have no bearing upon the case at bar. Although a Federal statute may have abolished for certain convenient purposes the distinction between principal and accessory, the fact still remains that from the standpoint of substantive law there is still a distinction which is observed in the rules of criminal pleading and must be borne in mind in considering the sufficiency of this plea.

See *State v. Buzzell,* 58 N. H. 257.

State v. Larkin, 49 N. H. 36

Unless this distinction is recognized, the defendant in this very case is in the curious position

of having been acquitted upon the first count of this indictment of the very offense of which he was convicted on the second count.

The import of the decision in *People v. Stephens, supra,* is that a man may not be twice put upon trial for the same act either by charging the offense in different forms or by splitting it up into several parts. Yet that is exactly what was attempted in the case at bar as is evidenced by the court's seventh instruction, Tr. pages 36-38. We have already seen that the gist of conspiracy is "co-operation". The court's theory of the matter, as set out in this instruction on page 38, seems to have been that if Louie's "co-operation" did not "aid" Ralston, it constituted only the offense of conspiracy, whereas if it did aid Ralston it constituted two different offenses. We have always labored under the impression that the word "co-operation" necessarily involved the idea of "aid", an idea which has the sanction of every dictionary to which we have had access. It seems to us that nothing can more clearly betray the fallacy of the Government's position in this case than the logic, or lack of it, embodied in the court's seventh instruction to the jury.

POINT II

THE COURT ERRED IN ITS SEVENTH INSTRUCTION TO THE JURY

In preparing the transcript there seems to have been some confusion in numbering the instructions, from which it might appear that the eighth instruction, to which our exception on page 38 refers by number, had been omitted. In fact all that is omitted is the number, of the instruction, and the exception shows plainly to what instruction it refers. This error has already been sufficiently considered in the foregoing portion of the brief, and we will not refer to it further.

POINT III

THE COURT ERRED IN ADMITTING THE GOVERNMENT'S EXHIBITS 3 TO 9 INCLUSIVE AND 11 TO 13 INCLUSIVE.

These letters will be found at pages 55-59 of the transcript. The only foundation laid for their introduction is the testimony of Edward D. Lemarge, page 26 of the transcript, that he found them

on the 6th of March, 1913, in a trunk in the residence of the defendant Charlie Louie.

As noted in our objection on page 27 of the transcript, there is nothing to identify these letters with the defendant or with the offense for which he was on trial. It does not appear that they were written by him or to him or were ever received by him or seen by him. Only by inuendo can it possibly be contended that they refer to opium. Many of them are entirely undated; but the ones which are dated appear to have been written months prior to the commission of the offense with which the defendant was charged. In all seriousness it seems to us that one must strain his imagination to the utmost to conceive of a case in which the objection of immateriality were better taken. In admitting these letters the court stated that they had no tendency to prove the offense charged, but admitted them to prove the defendant's "knowledge and the means of knowledge, whether that will enable you at all to determine if the Government establishes that he had it in his possession whether it might have been accidentally or innocently." (page 27 of the transcript). We are not gifted with sufficient foresight to comprehend how letters written in the spring and

summer of 1912, could prove knowledge of a thing that did not occur for nearly a year afterward.

POINT IV

THE COURT ERRED IN ADMITTING THE TESTIMONY OF MAGGIE MACLEAN THAT SHE HAD SEEN THE DEFENDANT RALSTON CALL AT THE DEFENDANT LOUIE'S HOME DURING THE EARLY PART OF 1913.

The testimony in question is found on pages 29 and 30 of the transcript. On its face this testimony is obviously immaterial, and unless counsel can suggest some theory upon which it could be material to any issue in the case we will not discuss the question further.

POINT V

THE COURT ERRED IN ADMITTING THE TESTIMONY OF A. B. HAMER, MARIAN BERGMAN AND EMMA FRIEDLAND REGARDING 6 CANS OF OPIUM FOR WHICH THE DEFENDANT LOUIE CALLED AT RALSTON'S ROOMS.

This testimony is found on pages 30 to 32 of the transcript. It was conceded by counsel and assumed by the court that this testimony related to transactions not involved in the indictment. (See tr. pp. 31, 32 and 33).

This evidence was admitted to prove the defendant's knowledge and intent. We respectfully submit that intent was not an issue. It was necessary and material to prove that the defendant had knowledge of certain things, to-wit: (1) that the opium was of foreign manufacture; (2) that it was prepared for smoking purposes; (3) that it had been unlawfully imported into the United States. If the former possession of the six cans could have proven these things, the evidence might have been admissible; but we would call the court's attention to the

fact that there was not a syllable of evidence to prove that the six cans referred to were either: (1) of foreign manufacture; or (2) prepared for smoking purposes; or (3) unlawfully imported into the United States. Without this, the evidence of the possession of these cans was immaterial and irrelevant, and its admission by the court was error.

We respectfully submit that having been once in jeopardy for this same offense, the cause should be remanded with instructions to dismiss the indictment.

Respectfully submitted,

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Attorneys for Plaintiff in Error.